NO. 48960-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JERMAINE L. A. GORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando

REPLY BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE GORE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL'S REPRESENTATION WAS DEFICIENT IN ALLOWING THE STATE TO SEARCH HIS CELL PHONE AND HE WAS PREJUDICED BY COUNSEL'S DEFICIENT REPRESENTATION WHERE THE EVIDENCE OBTAINED AS A RESULT OF THE SEARCH LED TO MORE SERIOUS CHARGES.

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S. Ct. 236, 240, 87 L. Ed. 268 (1942). The State argues that defense counsel "made a tactical decision to obtain the contents of the cell phone" and "[i]t was not defense counsel's 'fault' that the evidence on the defendant's phone was discovered." Brief of Respondent at 6-7. The record belies the State's argument.

Inexplicably, defense counsel did not even remember that he and Gore signed an order entered by the court which provided that by agreement of the parties, the State, through the Tacoma Police Department, shall make

a digital copy of the cell phone data that is subject to examination by the State:

> THE COURT: I would just indicate the March 7 order that was signed by Judge Rumbaugh does not have any limitations to a specific date. It actually says that TPD shall make a digital copy of the cell phone data. It also allowed potentially TPD to review the expert's forensic findings and compare them, and in the events that there was a discrepancy between the state and defense, then the department's digital copy would be used by the parties as the best evidence of the cellular date on the MC70.
>
> THE DEFENDANT: When did I stipulate and sign this order?
>
> THE COURT: That was signed by everybody, including Mr. Gore, on March 7, or at least that's when it was filed.
>
> THE DEFENDANT: I don't believe that I signed that.
>
> [DEFENSE COUNSEL]: I'm going to see if I can have a moment, Your Honor? I'm going to call it up on LINX.
>
> THE DEFENDANT: I would have never signed to that.
>
> [PROSECUTOR]: You want to look at it?
>
> [DEFENSE COUNSEL]: Yes, it's not letting me. Thank you.
>
> [THE DEFENDANT]: Didn't agree to none of that.
>
> [DEFENSE COUNSEL]: Mr. Gore has been emphatic the entire time that he's never agreed to anything other than May 5, which that's why he withdrew his consent to the release as outlined by counsel earlier.
>
> THE COURT: I can only go by the signed order of March 7.

04/05/16 RP 57-58.

The record substantiates that defense counsel allowed the State to search the entire contents of the cell phone, mistakenly believing he had authorized the State to search the cell phone only for the date of May 5. 04/05/16 RP 52-53. As noted by the court, the order entered on March 7, 2016, was signed by defense counsel and Gore. CP 397-99.

The State argues further that Gore was not prejudiced because the "[p]olice were going to search the phone whether the defense agreed to it or not." Brief of Respondent at 7. To the contrary, initially, the State had no intention of searching the phone. It was defense counsel who brought the phone to the State's attention:

> THE COURT: Let me just make sure I understand. The request for consent, or actually the request to obtain the text messages came from the defense?
>
> [DEFENSE COUNSEL]: True.
>
> THE COURT: This is not something that the State law enforcement was wanting to go in the phone and obtain evidence?
>
> [PROSECUTOR]: This originally came about as a request from the defense. That is correct.

02/25/16 RP 103.

The State additionally argues that defense counsel's performance was not deficient because he filed motions, made arguments, cross-examined witnesses, and vigorously challenged the evidence. Brief of Respondent at 8-9. "The object of an ineffectiveness claim is not to grade

counsel's performance." *Strickland*, 466 U.S. at 697. Regardless of whether defense counsel performed as an advocate for Gore at trial, his performance was deficient in allowing the State to search the entire contents of the phone. Gore was prejudiced by defense counsel's deficient performance because the evidence obtained by the State's search of the phone led to convictions of more serious crimes. Consequently, Gore's convictions must be reversed because he was denied his constitutional right to effective assistance of counsel.

2. THE FIREARM ENHANCEMENTS MUST BE REVERSED BECAUSE THE EVIDENCE FAILS TO PROVE BEYOND A REASONABLE DOUBT THAT GORE WAS ARMED WITH A FIREARM.

It is well settled that there must be a nexus between the weapon, the crime, and the defendant in constructive possession cases. *State v. Schelin*, 147 Wn. 2d 562, 575-76, 55 P. 3d 632 (2002). Without citing any authority, the State argues "[t]he relevant time period when the defendant is armed while he is committing the crime, not after he has been arrested or detained by the police." Brief of Respondent at 11. The State's unsupported argument falls contrary to the holding in *State v. Johnson*, 94 Wn. App. 882, 974 P.2d 855 (1999), *review denied*, 139 Wn.2d 1028 (2000). Johnson was convicted of controlled substance violations while armed with a deadly weapon. The police had arrested him in the living room of his home and

found a gun in an enclosed cabinet compartment underneath a coffee table. At the time, Johnson was handcuffed and seated between the living room and the dining room, with the gun five to six feet away from where he was sitting. 94 Wn. App. at 886-88. The Court reversed the deadly weapon enhancements, holding that there was no realistic possibility that Johnson could access his gun. The Court concluded that because Johnson was handcuffed and the gun was well outside his reach, the gun was not easily accessible and the required nexus between the crime and weapon was absent. 94 Wn. App at 894-97. The Court reasoned that when the only people endangered by the defendant's weapon possession are officers, the deadly weapon enhancement should only be applied where it furthers its intended purpose of ensuring officer safety. 94 Wn. App at 896-97. As in *Johnson*, there was no threat to officer safety where Gore was handcuffed and the gun was well outside his reach. 04/07/16 RP 314-15, 319-23, 330-35.

The State argues further that the evidence was sufficient because there were several firearms in the car. Brief of Respondent at 11. At trial, the parties stipulated that the gun found in the guitar case belonged to Jermohn Gore, the two guns in the backpack belonged to Alexander Kitt, and another gun belonged to Ladell Moton. 04/11/16 RP 485-86. The

presence of other firearms in the car had no bearing on whether Gore was armed with the firearm in the lower compartment of the center console.

Like in *Johnson*, where the police found the gun in an enclosed cabinet compartment of a coffee table, the police found the gun in an enclosed lower compartment of the center console. 04/07/16 RP 401-09. Gore was removed from the car and taken to a patrol car where he was handcuffed. 04/07/16 RP 332-35. Reversal of the firearm enhancements is required because the evidence fails to prove beyond a reasonable doubt that Gore was armed with a firearm.

3. REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT BY IMPROPERLY APPLYING THE PUZZLE ANALOGY TO REASONABLE DOUBT.

The State's argument that "the prosecutor used the puzzle analogy correctly," relying on *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014), misses the point. Brief of Respondent at 12-15. Importantly, the State fails to explain the need for a puzzle analogy in light of the Washington Supreme Court's holding in *State v. Bennett*, 161 Wn.2d 303, 317-18, 165 1241 (2007), that WPIC 4.01 adequately instructs the jury on reasonable doubt and permits both the government and the accused to argue their theories of the case. *Bennett* underscores that ordinary jurors would sufficiently understand proof beyond a reasonable doubt by following the

instruction. As argued in appellant's opening brief, this Court should abolish the puzzle analogy completely because it is unnecessary, distracts the jury, and does not further the ends of justice. The so-called puzzle analogy has no place in a court of law, it makes light of the rule of law, and it trivializes the serious role of the jury.

4. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD ADVISE THE COMMISSIONER NOT TO AWARD COSTS BECAUSE GORE REMAINS INDIGENT.

The State's argument that Gore chose a "life of criminal indolence" and not seeking costs if the State substantially prevails on appeal "flies in the face of the will of the Legislature" is misguided and should be rejected by this Court. Brief of Respondent 15-17. It is well established that "Washington's Const. art I, section 22 (amendment 10) grants not a mere privilege but a 'right to appeal in all cases.' " *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978)(quoting *State v. Schoel*, 54 Wn.2d 388, 341 P.2d 481 (1958)). In honoring this right, the Washington Supreme Court emphasized that the "presence of the right to appeal in our state constitution convinces us it is to be accorded the highest respect by this court." *Id.*

Gore exercised his constitutional right to appeal as he is entitled to do, especially when he has been sentenced to 308 months in prison. In light of no evidence provided to this Court, and no findings by the trial court, that

Gore's financial condition has improved or is likely to improve, this Court should advise the commissioner not to award costs if the State substantially prevails on appeal pursuant to the recently amended provisions of RAP 14.2.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Gore's convictions.

DATED this 20th day of March, 2017.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Jermaine L. A. Gore

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office at pcpatcecf@co.pierce.wa.us.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of March, 2017.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE
March 20, 2017 - 11:51 AM
Transmittal Letter

Document Uploaded: 1-489601-Reply Brief.pdf

Case Name: State v. Gore

Court of Appeals Case Number: 48960-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ___

Answer/Reply to Motion: ___

■ Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Valerie B Marushige - Email: ddvburns@aol.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us